UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:	CHAPTER 11
JITNEY JUNGLE STORES OF AMERICA, INC., ET AL.	CASE NO. 99-17191 Jointly Administered
Debtors	SECTION B

REASONS FOR ORDER

This matter came before the court on January 31, 2006 as a hearing on the motion to turn over and approve the proposed distribution of the proceeds of a director action settlement filed by Oakridge Consulting, Inc., ("Oakridge") in its capacity as the plan administrator. For the reasons expressed, the court finds that distribution scheme proposed by Oakridge is not consistent with the intent of the parties and denies Oakridge's motion to approve its proposed distribution. The court also finds that the director sharing mechanism[1] should be applied to the net settlement proceeds, i.e., after the attorneys' fees and costs have been deducted from the gross recovery amount, as proposed by the unsecured creditors' committee representative ("CCR").

I. <u>Background</u>

As part of the plan of reorganization in this case, the CCR was given the power to pursue a director action, as defined in the plan, against the debtor's pre-petition directors

---

[1] See definition of director sharing mechanism at page 3, *infra*.

and shareholders.[2] The CCR settled the director action for $43,500,000.00, and at issue now is the method by which the proceeds are to be divided between the parties. The plan provides only that the first $10,000,000 of recovery from the director action shall be paid to the unsecured creditors with any additional recovery to be shared equally between the unsecured creditors and the post-confirmation estate;[3] it made no mention of how the attorneys' fees and expenses were to be paid.[4]

Oakridge argues that this means that of the $43.5 million, the unsecured creditors get $26.75 million, the post-confirmation estate gets $16.75 million, and each side pays a pro-rated share of the fees and costs. According to Oakridge, this would leave the unsecured creditors with a net recovery of $15,522,590.38 and the post-confirmation estate with $9,876,294.91 before interest is figured into the total amount.[5]

The CCR argues that the director sharing mechanism was meant to apply to the proceeds net of fees and costs. According to the CCR, the fees and costs are first subtracted from the $43.5 million, then the unsecured creditors get $10 million, and the remainder is split evenly between the unsecured creditors and the post-confirmation estate. This would give the unsecured creditors a recovery of $17,835,738.63 and the post-

---

[2] Plan, Article I, Section B(41) reads: "Director Action: Any action or lawsuit against the Debtors' prepetition directors (other than Ronald Johnson) and shareholders including, BRS, its members and affiliates, for acts or omissions occurring prior to the Petition Date."

[3] Plan, Article I, Section B(42).

[4] Attorneys' fees and expenses totaled $17, 851,114.71.

[5] The court observes that the final figures will be somewhat different as interest has accrued and continues to accrue.

confirmation estate a recovery of $7,835,738.63. As is apparent from the math this is a swing of roughly $2 million.

II. Findings of Fact

1. The debtor's second amended plan of reorganization was confirmed by this court on December 15, 2000.

2. The plan gives the "Director Action" as defined in Article I, section B(41) to the Creditors' Committee Representative to prosecute.

3. The plan defines the "Director Sharing Mechanism" at Article I, section B(42) as follows: "The agreement between the Debtors and the Creditors' Committee that the first $10,000,000 of recovery from the Director Action shall be paid to the Holders of Class 3A, Class 3B, Class 3C, Class 3D and Class 3E pursuant to the Plan, with any additional recovery to be shared equally between the Unsecured Creditors and the Post-Confirmation Estate."

4. The director action and the director sharing mechanism became a part of the debtor's plan pursuant to negotiations between the debtor and the Unsecured Creditors' Committee ("UCC"). The UCC supported the debtor's plan in exchange for the right to pursue the director action. The UCC did not support the debtor's plan before this right was given to it.

5. At the time the debtor assigned the rights to pursue the director action to the CCR, no attempt was made to determine the value of the director action.

6. Oakridge Consulting, Inc. was appointed as the plan administrator and the junior

DIP lenders' estate representative.

7. Wells Fargo Bank, N.A. was appointed as the Creditors' Committee Estate Representative.

8. The CCR entered into a contingency fee agreement with the law firm Phelps Dunbar, LLP to represent the CCR in the director action.

9. The director action was eventually settled for $43,500,000.00.

10. The attorneys' fees and expenses earned by Phelps Dunbar in the course of reaching the settlement agreement were $17, 851,114.71.

11. Nothing in the plan designates how the attorneys' fees and expenses are to be paid, but the CCR had negotiated the contingency fee agreement between the CCR and Phelps Dunbar that provided for the payment of fees and expenses. The fees and expenses have been paid, and the remainder is held in an account pending a decision by this court as to the allocation of attorneys' fees.

12. Michael Salvati is the president of Oakridge and testified on behalf of Oakridge at the hearing. Mr. Salvati was not involved in the negotiations leading up to the assignment of the director action in the confirmed plan. Mr. Salvati did not become involved in the case until after plan confirmation when his company was appointed as plan administrator.

13. Lon LeClair is the representative of Wells Fargo who oversees the CCR duties of Wells Fargo. Mr. LeClair served on the Unsecured Creditors' Committee and was present at the UCC meetings wherein the attorneys for the UCC made presentations

about the negotiations between the UCC and the debtor with respect to the assignment of the director action.

14. Mr. LeClair sent a letter dated November 14, 2003[6] to Mr. Salvati that outlined the CCR's understanding of the terms of a proposed agreement between the CCR and Oakridge with respect to some differences arising in the BRS litigation that was being pursued by Oakridge.[7] The letter details the CCR's understanding of the arrangement between Oakridge and the CCR with respect to the payment of attorneys' fees and expenses incurred in pursuing the director action as follows:

> The Junior Estate Representative acknowledges that it has been advised of the Contingency Fee Contract by and between the Committee Representative and Phelps Dunbar, LLP and that the Junior Estate Representative recognizes that any sums allocated between it and the Committee Representative shall be net of payments to Phelps Dunbar pursuant to that agreement.

The letter asks Mr. Salvati to execute a copy and return it to Mr. LeClair. Mr. Salvati did not execute a copy because the dispute was subsequently settled, but he does acknowledge receiving the letter.

15. In the motion to approve the settlement agreement and the notice of the motion, the CCR outlined how the attorneys' fees and expenses were to be paid as follows:

> Defendants shall pay to the Representative the sum of Forty-

---

[6] Exhibit D-1.

[7] The BRS litigation was apparently an action related to, but carved out of and treated separately from, the director action.

> Three Million Five Hundred Thousand and No/100 ($43,500,000.00) Dollars. Net of attorney's fees and expenses of litigation, this will make available the sum of approximately Twenty-Six Million Four Hundred Fifty Thousand and No/100 ($26,450,000.00) Dollars for disbursement pursuant to the Director Sharing Mechanism, as defined in the Confirmed Plan.

The settlement agreement was approved by the court in an order dated May 26, 2004.

III. Legal Analysis

Under the plain language of the various documents in the record and introduced as evidence, it is clear that the parties made no provisions for the specific question of whether the director sharing mechanism was to be applied net of attorneys' fees and costs as argued by the CCR or whether the director sharing mechanism was to be applied to the gross recovery, with attorneys' fees and costs to be allocated in some manner thereafter as urged by Oakridge. Article 2054 of the Louisiana Civil Code states: "When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose." Thus, because the parties did not make a provision for the allocation of attorneys' fees and costs in either the plan or the various other agreements referenced, the court must look to the law, equity or usage for a solution.

As the court is unable to find, nor do either of the parties point to, a specific law that covers these circumstances, the court looks to Louisiana Civil Code Article 2055, which defines the principles of equity and usage:

> Equity as intended in the preceding articles, is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another. Usage, as intended in the preceding articles, is a practice regularly observed in affairs of a nature identical or similar to the object of a contract subject to interpretation.

Oakridge argues that usage or regular practice dictates sharing the burden of attorneys' fees and costs pro-rata, while the CCR argues that regular practice requires first paying all fees and costs and then applying the director sharing mechanism to the net recovery amount. The CCR's approach essentially means that the parties share the fees and costs equally although the unsecured creditors will end up with a larger share of the recovery. Neither side produced any evidence at the hearing, however, to support its contention that its proposition for splitting the fees and costs amounted to usage or regular practice.

Thus, the court looks to the principles of equity to determine how the costs and fees should be borne by the parties. In doing so, the court examines the intent of the parties.[8] The court first notes that it is the movant, Oakridge, that bears the burden of producing evidence and the burden of persuasion in this matter.[9]

Oakridge called on Mr. Michael Salvati ("Salvati"), its president, to testify. Salvati testified that the director action was assigned to the unsecured creditors to overcome their

---

[8] Louisiana Civil Code Article 2045: "Interpretation of a contract is the determination of the common intent of the parties."

[9] *Matter of Briscoe Enterprises, Ltd., II*, 994 F.2d 1160 (5th Cir. 1993) quoting *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

opposition to plan confirmation. He also testified that it was his understanding that the director sharing mechanism was to apply to the gross recovery proceeds. On cross-examination, however, there was some confusion as to what exactly Salvati thought because he stated that he agreed that a letter he received from the CCR[10] was consistent with his understanding of how the fees should be paid, indicating an agreement with the proposition that the director sharing mechanism applied to the proceeds net of fees and expenses. On redirect, however, he re-stated that he agreed that the fees were to be paid pro-rata. Salvati also stated that he had not been involved with the negotiations leading up to the plan provisions giving the director action to the unsecured creditors because he did not become involved with the case until Oakridge became the plan administrator, which was after plan confirmation. This leads the court to question whether his understanding of what was agreed to by the parties is relevant because he was not involved in the negotiation stage of reaching the agreement.

Oakridge produced as evidence two documents detailing its proposal for the application of the director sharing mechanism and compared this to the CCR's position.[11] These documents were both prepared by Oakridge after the settlement agreement was approved by the court. Although the documents provided detailed numerical analysis of each side's fee splitting proposal, they did not shed any light on the intent of either party at the time the agreement was reached. As further support for its position Oakridge pointed

---

[10] Exhibit D-1, letter dated November 14, 2003 from Lon LeClair to Michael Salvati.

[11] Exhibits P-1 and P-5.

to the amended post-confirmation estate agreement at Article I(1.3)(b)[12], which states that the responsibility and authority of the post-confirmation estate shall include, "calculating and implementing all distributions in accordance with the Plan." Additionally, it argued that the plan states the plan administrator has "the power to liquidate the Post-Confirmation Estate assets and provide for the distribution of the net proceeds thereof in accordance with the provisions of the Plan and the Post-Confirmation Estate Agreement."[13] As Oakridge admits, however, neither the plan nor the post-confirmation estate agreement addresses the issue of payment of fees and expenses, so these provisions are not particularly helpful to the court in determining this matter. While it is evident that Oakridge, as plan administrator, has the responsibility for distributing assets according to the plan, it is equally clear that this particular issue was not provided for in the plan.

The CCR called Mr. Lon LeClair ("LeClair"), a Wells Fargo employee, and the person designated as the representative. LeClair testified that he served on the Unsecured Creditors Committee (the "UCC") during the bankruptcy case. He also testified that the provision of the confirmed plan of reorganization giving the director action to the CCR to pursue on behalf of the estate's unsecured creditors was negotiated after the UCC objected to the debtor's first plan of reorganization, which gave the unsecured creditors nothing. Further, LeClair testified that the director action was given to the CCR to pursue because the debtor's estate believed it had no value and was willing to give the action to the

---

[12] Exhibit P-3.

[13] Plan, Article XII(B)(1)(v).

unsecured creditors to win their support for the plan. LeClair also testified that although he did not personally negotiate the deal giving the director action to the unsecured creditors, he was an active member of the UCC and was present at the UCC meetings wherein the attorneys who did negotiate the deal presented the results of the negotiations. He testified that as a result of the information presented to the members of the UCC, it was and had always been his understanding that the director sharing mechanism was to be applied to the net proceeds of any recovery, i.e., after the payment of all fees and costs.

The CCR introduced evidence at trial that explained the understanding of the CCR with respect to the payment of fees and costs for pursuing the director action. In a letter dated November 14, 2003[14], which was well before the settlement was negotiated, the CCR wrote to Oakridge detailing the CCR's intentions with respect to the payment of fees and costs. Paragraph 4(iii) of the letter states: "Any recovery in excess of $10,500,000.00 net of attorneys' fees and costs, shall be divided equally between the Unsecured Creditors Committee Estate Representative and Junior Estate Representative." Paragraph 4(v) of the November 14, 2003[15] letter states:

> The Junior Estate Representative acknowledges that it has been advised of the Contingency Fee Contract by and between the Committee Representative and Phelps Dunbar, LLP and that the Junior Estate Representative recognizes that any sums allocated between it and the Committee Representative shall be net of payments to Phelps Dunbar pursuant to that agreement.

---

[14] Exhibit D-1.

[15] Exhibit D-1.

The letter requests that Oakridge sign a copy of the letter and return it to the CCR as an acknowledgment of the agreement. At trial it was established that Oakridge did not sign the letter because the dispute that prompted the CCR to draft the letter had been resolved without the need for the letter, but Oakridge agreed that it had received the letter. Mr. LeClair also testified that he had discussed the letter with Mr. Salvati. Oakridge did not dispute that Salvati and LeClair discussed the letter.

Next, the CCR introduced the Creditors' Committee Estate Representative By-laws[16] to support their position. The relevant part reads as follows:

> *Application of Recoveries and Settlements.* The Representative shall apply all recoveries and settlements from the Actions, as well as the $400,000 advance funding provided by the Debtors pursuant to Article VIII, Section C of the Plan, and any proceeds therefrom, as follows:
>
> *First:* to pay the fees, costs and administrative expenses of the Representative and Plan Administrator, pursuant to section 3.06 below, up to but not to exceed $400,000, including, without limitation, compensation to the Representative and reimbursement of the Representative and Plan Administrator, pursuant to section 3.06 below, for any and all costs, expenses and liabilities incurred by it in connection with the performance of its duties under these By-laws, including the reasonable fees, disbursements, advances and related expenses of the Representative's attorneys, agents, advisors and experts.
>
> *Second:* to the extent available after paying or making adequate provision for the foregoing (including adequate provision for estimated administrative expenses of the Representative in connection with its pursuit of the Actions), to reimburse the Post-Confirmation Estate the advance funding provided by the Debtors pursuant to Article VIII, Section C of the Plan.
>
> *Third:* to the extent available, after paying the foregoing expenses and making the foregoing reimbursements, to be turned over to be disbursed

[16] Exhibit D-6.

> pursuant to Article VIII, Section B of the Plan.[17]

The CCR argues that this language means that the proceeds of the director action settlement are to be used first to reimburse the CCR for its attorneys' fees and expenses before making payment to the plan administrator. Oakridge does not appear to contest this assertion, stating:

> The By-laws. . . are nothing more than the ranking and preservation of priorities among the various interests and parties imposed on the Creditor Committee Estate Representative. . . . As one would expect, the lawyers and professionals have a first priority under Article III.5 of the By-laws from the total recovery. A second priority is granted to reimburse the Post-Confirmation Estate for the $400,000 advanced to the CCR by the Debtors' Estate. Once these two expense categories are satisfied, the balance of the recovery is 'to be turned over to the Plan Administrator to be distributed pursuant to Article VIII, Section B of the Plan.' There is nothing in the By-laws or the Plan that even addresses how the legal fees and expenses are to be allocated against the recovery.[18]

Although the court does not necessarily read section 3.5 of the by-laws as the parties do, if they agree, as they apparently do, that the by-laws set forth a priority of payment, the court will not impose its own reading over their agreement. The court will note, however, that while there is no mention of the allocation of attorneys' fees and expenses, that they are paid first indicates support for the CCR's position that the director sharing mechanism is meant to be applied to the recovery amount net of fees and costs.

---

[17] Creditors' Committee Estate Representative By-laws, section 3.5, Exhibit D-6.

[18] Reply memorandum of Oakridge Consulting, Inc., as the plan administrator to the objection of creditors committee estate representative to motion to turn over and approve proposed distribution of director action settlement proceeds at p. 9 **(P-4611)**.

Finally, the CCR argues that in the motion for approval of compromise it filed with this court, and the notice of hearing on that motion, there was language to put the plan administrator on notice that the payment of fees and expenses was to be made before application of the director sharing mechanism.[19] The CCR claims that because the plan administrator did not object at the time the motion was noticed for hearing, the court's order approving the settlement constitutes *res judicata* with respect to the issue of payment of fees and costs. Although the court does not accept this argument, and does not agree that the order it issued approving the settlement agreement constitutes *res judicata* with respect to the allocation of the payment of fees and costs between the parties, the court does consider the language in the motion for approval of compromise as one more indicator that the CCR believed that the understanding between the parties was that the director sharing mechanism was to be applied to the net recovery amount.

IV. Conclusion

Essentially this dispute boils down to satisfying the burdens of proof and persuasion. Oakridge, which bears those burdens, did not present enough evidence in support of its contention that its proposal for fee allocation was the intent of the parties.

---

[19] Motion for approval of compromise of the "Director Action" as defined in the second amended joint liquidating plan of reorganization **(P-3990)**, paragraph 15(i) reads:

> Defendants shall pay to the Representative the sum of Forty-Three Million Five Hundred Thousand and No/100 ($43,500,000.00) Dollars. Net of attorney's fees and expenses of litigation, this will make available the sum of approximately Twenty-Six Million Four Hundred Fifty Thousand and No/100 ($26,450,000.00) Dollars for disbursement pursuant to the Director Sharing Mechanism, as defined in the Confirmed Plan.

The CCR presented varying pieces of evidence that, while not conclusive, at least give the court a basis for finding that the facts support the CCR's contention that the intent of the parties was to apply the director sharing mechanism to the recovery amount net of attorneys' fees and expenses.

For the reasons stated above, the court finds that distribution scheme proposed by Oakridge is not consistent with the intent of the parties and denies Oakridge's motion to approve its proposed distribution. The court also finds that the director sharing mechanism should be applied to the net settlement proceeds, i.e., after the fees and costs have been deducted from the gross recovery amount, as proposed by the CCR.

New Orleans, Louisiana, April 13, 2006.

J. A. Brown

Jerry A. Brown
U.S. Bankruptcy Judge